Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-963

STATE OF TENNESSEE,
Petitioner,

v.

HARRY ARMSTRONG,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Court of Criminal Appeals of Tennessee

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PETITION FOR WRIT OF CERTIORARI

To the Court of Criminal Appeals of Tennessee

The Petitioner, the State of Tennessee, respectfully prays that a Writ of Certiorari issue to review the judgment of the Court of Criminal Appeals of Tennessee entered in the above-entitled case on March 2nd, 1977.

OPINIONS BELOW

The opinion of the Court of Criminal Appeals of Tennessee is reported at 555 S.W.2d 870 and is printed as Appendix A. No opinion was rendered by the Tennessee Supreme Court but a copy of the order denying petitioner's writ of certiorari is printed as Appendix B.

References to the Technical Record filed in this Court will hereinafter be indicated by the abbreviation (T.R.). The Bill of Exceptions filed in this Court will be referred to by the abbrevation (B.E.).

JURISDICTION

The judgment of the Tennessee Court of Criminal Appeals was entered on March 2nd, 1977 (Appendix A). The judgment of the Supreme Court of Tennessee was entered on September 26, 1977 (Appendix B). The jurisdiction of this Court is evoked under 28 U.S.C. § 1257(3) since the right has been especially set up and claimed under the Constitution of the United States.

QUESTION PRESENTED

Is the Trial Judge required by the Fourth Amendment of the United States Constitution to make an in-camera inspection of all the records of any wiretap in the defendant's lifetime if after an adversary hearing he has made a determination that there was no illegal wiretap in the instant case.

CONSTITUTIONAL PROVISION INVOLVED

The Constitutional provision which the above-entitled petition involves is as follows:

CONSTITUTION OF THE UNITED STATES,
AMENDMENT IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue,

> but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Factual Statement

Sgt. Fulton Hall, assigned in February, 1974, to the Vice Control Division of the Nashville Police Department, testified that he had conducted an investigation of the activities of Harry Armstrong. Sgt. Hall testified that on February 7 he met with Officers Erwin, Broadway and Bouchard, two photographers, and Benjamen "Cootsie" Whitfield. At this meeting, Sgt. Hall testified, Whitfield placed a call to Harry Armstrong's service station, and that the call was taped on a tape recorder. Sgt. Hall testified that Whitfield asked to speak to Harry Armstrong and that he asked Harry to sell him "a dipper of heroin." (B.E. 193-195). Sgt. Hall said that Whitfield later called the defendant back and all the phone conversations were taped. The tape was introduced into evidence and played for the jury (B.E. 198-199). The tape contained the conversation of two parties identifying themselves to be "Cootsie" and "Harry". Harry agreed to sell "Cootsie" some heroin that day at 1801 Seventh Avenue North in Nashville and indicated that a man was already waiting for Whitfield at that location (Tape Recording).

Sgt. Hall then testified that both Whitfield and his car were searched for drugs to make sure none were in his possession (B.E. 199). Sgt. Hall stated that he then climbed into the trunk of Whitfield's automobile and that the trunk was then closed. Sgt. Hall stated that the car drove for about fifteen (15) minutes, and then stopped. Sgt. Hall stated that he heard a conversation between two individuals and that the trunk was opened

and a package was tossed in. The trunk was closed again and not opened until they reached the Youth Guidance Center (B.E. 201-203). Sgt. Hall then identified the package that he received (B.E. 203-204).

Officer Donnie Ray Broadway confirmed Sgt. Hall's testimony regarding the phone conversations (B.E. 219-224). Officer Broadway testified that he and a news photographer Milton McClurkin, followed Whitfield to 801 17th Ave. North. Officer Broadway stated that he saw Homer Goodwin get in Whitfield's car for a few minutes and then get out again. Officer Broadway stated he saw Goodwin put something in his shirt pocket and then leave. Officer Groadway also testified that Whitfield opened the trunk, put his hand inside and then pulled it out again (B.E. 228). Meanwhile Mr. McClurkin was taking a moving picture of the entire incident. The resulting film was admitted into evidence and shown to the jury (B.E. 245).

Officer Frank Erwin testified that he went to the defendant's service station at 1800 Clay Street. Officer Erwin testified that he was accompanied by Mr. Tarkington, a photographer who took several pictures of people at the service station. Officer Erwin testified that after receiving radio confirmation of the buy, a photograph was taken of Homer Goodwin at the service station and Officer Erwin identified such photograph (B.E. 252). The photographer identified the photographs taken at the service station and testified that they accurately depicted the scene (B.E. 269-273).

Several witnesses testified as to the chain of custody of the film and the small foil package received from Homer Goodwin (B.E. 274-286).

Benjamin Whitfield testified that he had sold drugs for Harry Armstrong and also bought drugs from him for approximately one year, prior to February 7, 1974 (B.E. 291). Whitfield testified that on February 7, 1974, he called Harry Armstrong

and arranged with Armstrong to purchase some narcotics (B.E. 298, 304). The tape of the telephone conversation was played, and Whitfield identified his own voice, that of an employee at the defendant's service station, and the voice of the defendant himself (B.E. 296-302). Whitfield testified that the defendant told him that the boy he was sending with the heroin was on his way and would meet Whitfield (B.E. 304).

Whitfield observed the moving picture of what occurred between himself and Homer Goodwin and confirmed it to be accurate. Whitfield testified that Goodwin gave him a spoon of heroin in exchange for $125. He further stated that "That was Harry's boy that Harry sent with the dope," referring to Goodwin. Whitfield stated that he gave the heroin to Sgt. Hall in the trunk of his car (B.E. 307-308).

Whitfield further testified that he received two thousand dollars ($2,000) as an advance from Armstrong to prevent Whitfield from appearing in court to testify (B.E. 311-312).

Mr. Phillip Freeze, a toxicologist with the Tennessee Public Health Department, identified the package given to Sgt. Hall by Benjamin Whitfield as heroin (B.E. 347).

Homer Goodwin testified that he was employed at a service station owned by the defendant, Harry Armstrong, and was earning $250 a week (B.E. 353). Goodwin testified that this amount included income from delivering heroin on behalf of Armstrong (B.E. 354). Goodwin testified he made a delivery to Whitfield on February 7, 1974, and confirmed the moving pictures and photographs of the event as accurate (B.E. 355-356). Goodwin stated that Armstrong had instructed him to take the heroin to Whitfield (B.E. 357). Goodwin further testified that he saved the money until the end of the day when he handed it over to the defendant, Harry Armstrong, and that he gave Armstrong on an average of $4,000 per day resulting from these heroin sales (B.E. 359-360). Goodwin then testified to

numerous other drug transactions he conducted on behalf of Armstrong (B.E. 361-378).

The defendant offered the testimony of William Stanley Sharpe, a Criminal Investigaor for the District Attorney who testified that he learned that Benjamin Whitfield had tried to sell some tapes made by Officers Erwin and Bouchard back to Harry Armstrong, the defendant (B.E. 424).

Anthony Bouchard, a former Meropolitan Police Officer on the Vice Squad testified that he worked with Officer Frank Erwin in the investigation regarding the defendant. Bouchard testified that Whitfield became an informant in exchange for the police "doing away with his case." (B.E. 431-432). Bouchard stated that it was his impression that on February 7, 1974, when Whitfield called the defendant's service station, Whitfield talked to Goodwin at some point (B.E. 435). Bouchard further testified that the investigation continued after February 7, because the police were dissatisfied with the case against Armstrong (B.E. 440).

John Tummel, court reporter for the U.S. Federal District Court, read a transcript from the case of *U.S. v. Frierson*. In this transcript Benjamin Whitfield admitted selling narcotics for Charles Fierson, but did not mention the name of Harry Armstrong (B.E. 561-562). State's rebuttal witness Fulton Hall, in charge of the investigation of Harry Armsrong's activities, testified that he and the other officers involved were pleased with the results of the February 7, 1974 telephone call and drug transaction (B.E. 584).

Officer Donnie Broadway testified that on February 7, 1974, Anthony Bouchard was assigned to go to the residence of Homer Goodwin and was not at any time in the vicinity of the location at which the drug transactions took place (B.E. 588-589).

HOW THE FEDERAL QUESTION AROSE

Defendant Armstrong was indicted along with Mr. Homer Edward Goodwin by the Davidson County Grand Jury at its January, 1974 term. Defendant filed a Motion to suppress any evidence arising from illegal wiretaps. Defendant also moved to be allowed to inspect any records in the possession of the State relating to such wiretaps. After an evidentiary hearing, the Court dismissed both motions, determining that there was no illegal wiretap. Defendant was then tried on October 20-23, 1975 and convicted of selling a controlled substance (T.R. 60-69).

The decision was appealed to the Tennessee Court of Criminal Appeals. The Tennessee Court of Criminal Appeals remanded the decision as to the wiretap. In its remand, the Tennessee Court of Criminal Appeals ordered the Trial Judge "to inspect all relevant available records for the purpose of making a re-determination of the initial prong of the *Alderman* test: Whether an illegal wiretap was installed on the defendant's telephone on or prior to February 7, 1974. If the court finds that no such wiretap existed on or before that date, the conviction will stand affirmed as modified below in Section 3. (The modification was as to sentencing, is unrelated to the wiretap question and is not upon appeal here). If, however, the court finds that the records tend to establish the existence of illegal eavesdropping on or before the date in question, the court must then schedule a new *Nardone* hearing and immediately release to the defendant any *Alderman* material contained in those records. *Armstrong v. State*, 555 S.W.2d 870 at 874 (Tenn. 1977).

The petitioner, the State of Tennessee, petitioned the Supreme Court of the State of Tennessee for writ of certiorari regarding the wiretap issue; the Petition by the State of Tennessee was denied on September 26, 1977.

The Tennessee Court of Criminal Appeals thereafter issued a stay of its judgment regarding the wiretap question pending a decision by the United States Supreme Court, and based this stay upon its acknowledgement that "a substantial question of United States Constitutional Law is being presented to the United States Supreme Court" (Appendix C).

REASON FOR GRANTING THE WRIT

The Important Question of Whether the Trial Judge Should Inspect in Camera All Government Records Regarding Possible Wiretaps at Any Time in the Defendant's Lifetime Is Squarely Presented Here and Should Be Decided by This Court.

The petitioner contends that the Tennessee Court of Criminal Appeals has mistinterpreted the holdings of *Nardone v. United States*, 308 U.S. 388 (1939) and *Alderman v. United States*, 394 U.S. 165 (1969). It appears that the decision of the Court of Criminal Appeals of Tennessee would require that if the defendant had been subject to a wiretap investigation at any time in his life, even after the conclusion of the investigation and the arrest, such wiretap records must still be reviewed by the Trial Court in camera as a part of the determination of the existence of the illegal wiretap. Testimony in an adversary hearing would be inadequate.[1]

Such action would reverse the burden of proof established by *Nardone v. United States, supra*, in which the burden is upon the defendant to prove the existence of an illegal wiretap. *See* also *Alderman v. U.S., supra*; *Giordano v. United States*, 394 U.S. 310 (1969). Pursuant to the Court of Criminal Appeals' ruling, an in camera inspection of any records of electronic eavesdropping during the defendant's lifetime is mandatory at the slightest insinuation of wiretapping in the case in question. No proof by the State of the remoteness of such wiretaps would suffice. This appears to be a shift of the *Nardone* burden of proof.

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[1] In the instant case, as noted above, the defendant was convicted of the sale of heroin by one of his agents to a police agent on February 7, 1974. An evidentiary hearing was held regarding this sale. The State's witnesses denied that any wire-tap occurred prior to February 7. Even the defense witnesses could not establish that the wiretap occurred prior to February 7.

The Court of Criminal Appeals justifies its decision by citing *Alderman v. U.S., supra.* In *Alderman,* this Court has recognized the right of a defendant to examine records of proven unlawful surveillance without having these records first screened for relevancy. *Alderman* is thus inapplicable to the situation where the existence of an illegal wiretap has not yet been established.

The petitioner would submit that it is further inapplicable to surveillances remote from the instant case:

> Implicit in the *Alderman* rationale is the requirement that there be at least a remote possibility that the surveillances could have resulted in the use of obtaining evidence to convict the defendant. *United States v. Sellers,* 315 F.Supp. 1022 at 1023 (1970).

See also *U.S. v. Ahmad,* 347 F.Supp. 912 (M.D. Penn. 1972); *U.S. v. Butenko,* 318 F.Supp. 66 (M.D.N.J. 1970).

It is apparently the position of the Court of Criminal Appeals of Tennessee that during the first stage, where the defendant has the burden of proof, *Alderman* does not require that the relevant records be released, but that the Trial Court review such records and determine whether such records be relevant to the establishment of the defendant's case that a non-remote wiretap did exist.

The State would submit that such an automatic review of governmental records every time the existence of a wiretap is insinuated would be an extreme burden upon the government and a misapplication of the Fourth Amendment Exclusionary Rule. The State would further submit that the present system of an adversary evidentiary hearing to determine whether the existence of an illegal wiretap is mere suspicion or fact is a sufficient procedure to protect Fourth Amendment rights. Further guarantees are unnecessary and would place a severe burden on the administration of justice.

In summation at issue is whether the Trial Court in determining the existence of an illegal electronic surveillance in a particular case must review all records regarding the defendant in the government's possession even if in an adversary hearing, the government has proven to the satisfaction of the trial judge the non-existence of the wiretap. This is an important federal question not heretofore decided by this Honorable Court and the Tennessee Court of Criminal Appeals has decided this question contrary to the interpretation heretofore rendered. This is therefore a question that should be resolved by this Court for clarification and direction to the various State Courts and Lower Federal Courts.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted

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APPENDIX

APPENDIX A

In the Court of Criminal Appeals of Tennessee
at Nashville

September 1976

Harry Armstrong,	Appellant	No. B-3057 Davidson County The Honorable John L. Draper, Judge (Selling a Controlled Substance)
v.		
State of Tennessee,	Appellee	

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Opinion Filed: March 2, 1977

Modified in Part and Remanded With Instructions

Martha Craig Daughtrey
Judge

OPINION

The defendant-appellant, Harry Armstrong, was convicted by a Davidson County Criminal Court jury of selling heroin, a Schedule I drug under the Tennessee Drug Control Act, T.C.A. § 52-1413(b)(10). He was sentenced to serve not less than ten nor more than fifteen years in the penitentiary and fined $18,000.00. Without challenging the sufficiency of the evidence to sustain this conviction, Armstrong raises several assignments of error regarding procedural aspects of his trial. For the reasons set out below, we find that at least two of the alleged errors have adversely affected his right to a fair trial, and accordingly modify the judgment of the trial court and remand this case for further proceedings.

I. The Wiretap Controversy

The defendant first contends that this prosecution should have been dismissed by operation of law, specifically T.C.A. § 52-1438, which bars retrial in the courts of Tennessee of a defendant who has been tried in another state or in federal court for an offense which is a violation of the Tennessee Drug Control Act. Armstrong argues that the dismissal of a federal indictment charging him, along with others, with conspiring to sell heroin and cocaine and distribution of heroin and cocaine in the Middle District of Tennessee between April 1973 and November 1974 served as the "functional equivalent" of an acquittal of those charges, for the purpose of barring a subsequent trial in state court under T.C.A. § 52-1438. We do not agree. The federal indictment in question was dismissed upon pre-trial motion of the government, when it was learned that an illegal wiretap had been placed on the defendant's telephone. It is clear that dismissal upon pre-trial motion does not bar further prosecution because it occurs prior to the defendant's being placed in jeopardy. *Serfass v. United States*, 420 U.S. 377

(1975). Retrial will not be barred by T.C.A. § 52-1438 unless jeopardy has attached in the prior trial, and the defendant is not placed in jeopardy until the jury is impanelled. *Green v. United States*, 355 U.S. 184 (1957). This assignment is overruled.

During the defendant's trial, much was made of the illegal wiretap which was the cause of the dismissal of the federal indictment, and the local police internal affairs investigations which it engendered. The single sale of narcotics which was the subject of the instant prosecution took place on February 7, 1974, a date within the period of conspiracy alleged in the federal indictment. According to the record, the police secured the cooperation of one Benjamin (Cootsie) Whitfield, who agreed to place a telephone call to the defendant's place of business, a local service station, for the purpose of arranging a drug buy. In two recorded phone conversations with the defendant, which occurred on February 7 and which were later replayed for the jury, Whitfield first inquired about the possibility of buying a quantity of cocaine, and later agreed with Armstrong to the purchase of a relatively small amount of heroin.* The exchange took place at an assigned location shortly thereafter. It was photographed and also was overheard by a police officer hidden in the trunk of Whitfield's car. The actual transfer to Whitfield was made by Homer Goodwin, an employee at the defendant's service station. Goodwin originally was jointly indicted with the defendant for the sale in question; his case was later severed and both he and Whitfield testified for the State concerning the details of the sale. Goodwin maintained that he was acting as Armstrong's agent in carrying out the transaction.

In an effort to show that the illegal wiretap was installed prior to February 7, 1974, the defense moved to be allowed

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* The 1.2 grams of powder involved in the sale had a 13.9% heroin content. The toxicologist testified that a normal percentage on a "street" sale would range between 2% and 15%. The amount of money which changed hands was $125.00.

to inspect any records in the possession of the State related to this wiretap, including transcripts of conversations and statements made by the officers involved during federal and state investigations into the illegal wiretapping. After these motions were denied, the defense made an oral motion that the Court inspect these files in camera and decide whether this material contained any evidence which might tend to be exculpatory in nature. This motion was also overruled.

When it is alleged that a prosecution is tainted by evidence which has been gathered through illegal electronic eavesdropping, the burden is on the defendant to make out a prima facie case that the illegal wiretapping did indeed take place. If this sizable hurdle can be cleared, then by law the burden of proof shifts to the State to show that none of the evidence to be introduced against the defendant is "fruit of the poisoned [wiretap] tree," but was secured through a completely independent source or sources. *Nardone v. United States*, 308 U.S. 388 (1939). In the instant case, the trial court specifically ruled that the defendant had failed to carry his burden under *Nardone, supra*, and refused to require the State to show that its case against the defendant arose from sources independent of any illegal wiretapping.

It appears from the record of the arguments below and from those before this Court that both the defendant and the trial court were unaware of the opinion of the United States Supreme Court in *Alderman v. United States*, 394 U.S. 165 (1969). In *Alderman* the Supreme Court dealt with the difficulties faced by a defendant in attempting to sustain the burden of proof necessary to shift the onus onto the State to prove the independent sources of its case. *Alderman* holds that "surveillance records as to which any petitioner has standing to object should be turned over to him without being screened in camera by the trial judge." 394 U.S. at 182. The reason for requiring this information to be made available to the defendant directly was clearly set out by the Court:

> An apparently innocent phrase, a chance remark, a reference to what appears to be a neutral person or event, the identity of a caller or the individual on the other end of a telephone, or even the manner of speaking or using words may have special significance to one who knows the more intimate facts of an accused's life. And yet that information may be wholly colorless and devoid of meaning to one less well acquainted with all relevant circumstances. Unavoidably, this is a matter of judgment, but in our view the task is too complex, and the margin for error too great, to rely wholly on the in camera judgment of the trial court to identify those records which might have contributed to the Government's case.

Petitioner Alderman's conviction was remanded to the District Court for a two-pronged determination: first, whether there was any electronic surveillance in violation of his Fourth Amendment rights; and, secondly, if there was such eavesdropping, "the nature and relevance to his conviction of any conversations which may have been overheard through that surveillance." 394 U.S. at 186.

In the case of defendant Armstrong there is ample evidence of, and the State all but concedes, the existence of an illegal wiretap on the telephone at the defendant's place of business. The *Nardone* arguments at trial centered around Armstring's attempt to show that the wiretap was in place prior to February 7, 1974, the date of the sale which is the basis of this conviction. To aid in this effort, Armstrong had filed a timely motion for discovery of existing investigatory reports related to the wiretap, or alternatively for an in camera inspection of these records by the trial judge. The transcript of the pre-trial hearing on this motion tends to indicate that the files were highly relevant to, and very possibly conclusive on the factual issue raised. The trial judge denied the defendant's discovery motion, apparently in response to the State's contention that the material was not

subject to discovery under T.C.A. § 40-2044, and without addressing the constitutional mandate of *Alderman*. Because the defendant could not show, prima facie, that Armstrong's phone was "bugged" on February 7 or before, the trial court overruled the *Nardone* motion. Under the circumstances we think this was error.

The issue of the illegal wiretapping to secure information that is later made the basis of a criminal prosecution falls into a highly sensitive constitutional area under the Fourth Amendment. While we would willingly agree that an accused has no right to unlimited inspection of government files, especially when those files are likely to contain information which could affect the safety of government undercover agents and informants, it is also apparent that no harm can result from the trial court's inspection of such records whenever it appears that their content will shed light on the very question presented for determination: whether in fact illegal taps were used against the accused and, if so, when they were put into operation. This kind of information is peculiarly available to the prosecution and will rarely, if ever, be openly or readily accessible to the accused, thus making the burden under *Nardone* nearly impossible to sustain in the absence of aid from the court, an institution which is charged with the ultimate responsibility of protecting rights under the federal and state constitutions. For a court to refuse to inspect relevant records in this setting strikes us as a virtual abdication of the court's constitutional duty under the Fourth Amendment.

The holding in *Alderman* means that ultimately an in camera inspection by the trial judge may not be enough to fully protect the defendant's Fourth Amendment rights, and that once the court finds, prima facie, the existence of an illegal wiretap, any surveillance records made by the government or state must be turned over to the defendant for use in rebutting the prosecution's contention that the case is untainted by the illegal wiretap.

Because the wiretap ruling below was made without benefit of court inspection of the relevant records and without compliance with the dictates of *Alderman*, we find that the defendant's rights under the Fourth Amendment and under the Due Process Cluase were not fully protected. It follows that the case must be remanded for further proceedings related to the wiretap controversy.

Upon remand, the trial judge is ordered to inspect all relevant available records for the purpose of making a redetermination of the initial prong of the *Alderman* test: whether an illegal wiretap was installed on the defendant's telephone on or prior to February 7, 1974. If the court finds that no such wiretap existed on or before that date, the conviction will stand affirmed as modified below in Section III. If, however, the court finds that the records tend to establish the existence of illegal eavesdropping on or before the date in question, the court must then schedule a new *Nardone* hearing and immediately release to the defendant any *Alderman* material contained in those records.

At the rehearing, two results are possible. The State may be able successfully to carry the burden assigned under *Nardone* by establishing as the basis for the prosecution against Armstrong a source of information independant of the illegal tap. If so, the conviction will stand affirmed as modified below. On the other hand, if the State is unable to discharge its burden, the court, having found the prosecution to be tainted by the illegal wiretap, must enter an order dismissing this case.

Both the determination as to the necessity for a new hearing and any resulting order will be reviewable by this court, but the finding of the jury as to the defendant's guilt will not be subject to further review. In the event that the case is again brought before this court, all records inspected by the trial court shall be sealed and made a part of the record on appeal.

II. Alleged Errors at Trial

The defendant alleges that prosecutorial misconduct at trial requires the reversal of his conviction. We do not agree. From a thorough reading of the record we are convinced that although the prosecutor did wander near the borders of acceptable conduct at various intervals during his argument, defense counsel objected to these sallies. The trial court, thus alerted, cautioned counsel for the State and properly instructed the jury regarding these matters. Any error was corrected by these timely instructions.

The defendant next alleges that an agreement existed between the State and a prosecution witness, Homer Goodwin, and that the State denied the defendant due process by failing to disclose such agreement to the jury. Reviewing the record, we find that the evidence does not support this contention. When asked to reveal such an agreement, the State denied its existence, and the defendant was unable to rebut this denial. Moreover, the jury was made aware of the cooperation that had occurred between the witness and the State. On cross-examination Homer Goodwin admitted that officers of the Metro Police Vice Squad and the Federal Drug Enforcement Agency had intervened in his behalf in the matter of the revocation of his probation and that they had helped secure his release from jail. Defendant's allegation that Goodwin had been receiving money from the federal government and the Metro Vice Squad over a period of several months is not supported by the evidence. The record does show that the witness appeared to act on the expectation that he would benefit from testifying against the defendant, and the existence of such an expectation was conveyed effectively to the jury on cross-examination. This assignment is overruled.

In another assignment of error, the defendant challenges the ruling of the trial court releasing the State from the responsibility for the attendance at trial of a key prosecution witness, Cootsie Whitfield. This witness had been in protective custody until the day he was called to testify by the State. When court was adjourned that afternoon, the defendant requested the trial court to order the State to retain Whitfield in protective custody for an additional night, so that he might be recalled the following day by the defendant for the purpose of impeaching his credibility. The State objected, saying that it had "exhausted its funds and facilities and its personnel in protecting this man." The trial court released the State from responsibility, but "admonished" the witness to return the next morning. When Whitfield did not appear, the court issued an attachment for his arrest, but the capias was never successfully executed.

While this issue addressed itself to the discretion of the trial court, "constitutional requirements are not, in this day, to be measured or limited by dollar considerations." *Jackson v. Bishop*, 404 F.2d 571, 580 (8th Cir. 1968). These words from now Justice Blackmun should guide the trial court and the prosecution in the future. However, in the present case there was no resulting prejudice to the defendant because the jury was made aware of the prior inconsistent testimony which was to be the basis of the impeachment on recall by introduction of the official, transcribed copy of that prior testimony.

III. The Sentence

Finally, the defendant contends that the State introduced evidence of crimes other than the one charged for the prejudicial purpose of influencing the jury to double the minimum sentence, as provided in T.C.A. §40-2707. Reading the record, this Court is alarmed at the lengths to which the prosecution went in its attempt to portray the defendant as engaged in continuing, large-scale, illicit drug trafficking, when the defendant was charged solely with a single sale of a relatively

small quantity of narcotic. It is the settled law in Tennessee that proof which tends to show that the accused is guilty of the commission of other crimes and offenses is generally inadmissible for the purpose of proving the defendant's guilt of the specific crime charged. *McGowan v. State*, 221 Tenn. 442, 427 S.W.2d 555 (1968). Such evidence will only be admissible for the limited purpose of showing motive, guilty knowledge, intent, identity, absence of mistake, or common scheme or design. *McGowan v. State, supra; Carroll v. State*, 212 Tenn. 464, 370 S.W.2d 523 (1963). Some of the evidence of other sales introduced at trial tended to prove the existence of a common scheme or plan and thus may be viewed as legitimately corroborative of Homer Goodwin's testimony that he was acting as an agent of Armstrong, a fact which would establish the defendant's complicity in the crime charged. But we think a great deal of the other crimes evidence went beyond this limit. *Cf. United States v. Pierce*, 491 F.2d 1253 (6th Cir. 1974). In attempting to portray Armstrong as the area's leading narcotics dealer, the State engaged in impermissible "overkill." *Manning v. Rose*, 507 F.2d 889, 895 (6th Cir. 1974) (dictum).

We hold that the trial court erred in allowing the State to present such evidence to the jury by overruling the defendant's objections to this presentation. However, in light of the overwhelming evidence supporting the jury's determination of the defendant's guilt with regard to the February 7 sale, we think that the error, as suggested in the defendant's brief, related solely to the penalty imposed, which was the statutory maximum possible under T.C.A. §52-1432(a)(1)(A). Certainly we are unable to say beyond a reasonable doubt that the sentence and fine assessed were not affected by the offending evidence. Accordingly, we reduce the penitentiary sentence to five years and nullify the fine imposed, thereby assessing the minimum penalty provided by statute, subject to the consent of the State. *Huffman v. State*, 200 Tenn. 487, 292 S.W.2d

738 (1956). If a new hearing on the penalty to be assessed is required, it should be consolidated for purposes of appeal with any rehearing which is necessitated under Section I of this opinion.

For the reasons set out above, the judgment of the trial court is modified as indicated and this case is remanded for further proceedings consistent with this opinion.

MARTHA CRAIG DAUGHTREY, Judge

Concur:

WILLIAM S. RUSSELL, Panel Presiding Judge
CHARLES GALBREATH, Judge

APPENDIX B

In the Supreme Court of Tennessee
At Nashville

State of Tennessee, Petitioner,
v.
Harry Armstrong, Respondent.
Davidson Criminal Docket Number B-3057 C.C.A.

ORDER

On considering the petition for certiorari and briefs filed in this case and the entire record, the petition of the State of Tennessee is denied.

Per Curiam

APPENDIX C

In the Court of Criminal Appeals of Tennessee
At Nashville

Harry Armstrong, Appellant,
v.
State of Tennessee, Appellee.
Davidson County No. B-3057

ORDER

It appearing that the appellee is petitioning the United States Supreme Court for a Writ of Certiorari in the above-styled case;

It further appearing that the appellee has demonstrated an extraordinary need for a stay of the judgment of the Court of Crimnial Appeals;

It further appearing that a substantial question of United States Constitutional law is being presented to the United States Supreme Court;

It Is the Order of This Court that the execution of its judgment regarding an in camera inspection of evidence pertaining to a possible wiretap be stayed until the final decision by the United States Supreme Court in the above-styled case.

Entered this 5th day of October, 1977.

WILLIAM S. RUSSELL
Judge

MARTHA CRAIG DAUGHTREY
Judge

CHARLES GALBREATH
Judge